

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
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	)	
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HESPERIA UNIFIED SCHOOL		
DISTRICT, HESPERIA, CALIFORNIA	)	File No. SLD 143721
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	CC Docket No. 96-45

**REQUEST FOR REVIEW OF THE DECISION AND WAIVER OF THE  
DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY  
HESPERIA UNIFIED SCHOOL DISTRICT,  
HESPERIA, CALIFORNIA**

## I. INTRODUCTION

1. The Hesperia Unified School District, (the “District”) appeals the decision of the Universal Service Administrative Company (“USAC”) concerning the Schools and Libraries Universal Service Support Mechanism (also known as the E-rate program) to issue a Commitment Adjustment (“COMAD”) for FY2005 Form 471 # 554380 FRN 1546937 due to an alleged competitive bidding violation.
2. The District requests that the Commission review the decision of USAC to issue a COMAD and consider the extenuating circumstances described in detail in the proceeding document.

## II. BACKGROUND

The COMAD was issued as a result of the District undergoing an Attestation Examination in Spring of 2009. The specific information presented by the auditors’ as to the reason the finding was issued is as follows.

### Condition:

In performing our procedures over the competitive bidding process, [the auditors] noted for Funding Year 2007, Funding Request Number (“FRN”) 1546937, the services being requested were covered under an existing contract that was executed following the posting of the FCC Form 470, *Description of Services Requested and Certification Form*, in Funding Year 2005. As such, [the auditors] obtained the bidding documents for Funding Year 2005 related to this service and noted the following:

- Block 2 – Summary Description of Needs and Services of the FCC Form 470 indicated that an Request For Proposal (RFP) was not used. However, upon inquiry and review of the bidding documents, [the auditors] noted that an RFP was used.
- The RFP was advertised on January 29, 2005 and the bid process was closed on February 14, 2005. The RFP was open for 16 days which is less than the required 28 day waiting period.

[the auditors] reviewed the bid responses received and noted that Hesperia Unified School District (“the Beneficiary”) properly evaluated the bids in accordance with FCC rules.

**Criteria:**

Ysleta order (FCC 03-313) states in paragraph 39,

“We direct the Wireline Competition Bureau (WCB) to clarify on a revised FCC Form 470, before the start of Funding Year 2004, that an applicant shall certify either, “Yes, I have released or intend to release an RFP for these services” or “No, I have not released and do not intend to release an RFP for these services.” We anticipate that applicants will know at the time that they submit their FCC Form 470 whether they intend to release an RFP relating to the services listed on the FCC Form 470. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. This clarification will help to fulfill the purposes of the FCC Form 470 by informing potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form.”

Schools and Libraries News Brief (November 21, 2008<sup>1</sup>) states the following:

“Some state or local procurement rules or regulations require applicants to issue a Request For Proposals (RFP) in addition to the Form 470. In other cases, applicants may choose to issue an RFP even though one is not required by state or local procurement regulations. FCC rules require that, if you issue an RFP, it must be available to bidders for 28 days just like the Form 470. If you issue an RFP after you post a Form 470, your ACD is actually 28 days after you issued the RFP, not 28 days after you posted the Form 470.”

The Hesperia Unified School District attempts at all times to follow local, State, and Federal procurement guidelines to ensure that it meets its fiduciary responsibility in expending public funds. It is the opinion of the District that while some of the timing of events that occurred during procurement of services and a contract during FY2005 processes may seem problematic on the surface, it met the requirements of conducting an open and competitive bidding process in selecting a service provider for the sake of purchasing high speed digital transmission services during the Funding Year 2005.

**It states in the Ysleta order (FCC 03-313)** *“...that an applicant shall certify either, Yes, I have released or intend to release an RFP for these services” or “No, I have not released and do not intend to release an RFP for these services.” We anticipate that applicants will know at the time that they submit their FCC Form 470 whether they intend to release an RFP relating to the services listed on the FCC Form 470.”*

As relayed to the auditors (and mentioned in the auditor’s work papers under “Cause”) when the Hesperia Unified School District posted its Form 470 for the Funding Year 2005 process, the District did not intend to file an RFP in the category of Telecommunications. HUSD would also contend that the Ysleta Order was predicated on the fact that there was an RFP **that (with intention) was not fully disclosed:**

**Ysleta Order** FCC 03-313 (released 12/8/03)

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<sup>1</sup> Note: The auditors referred to guidance that was issued nearly 4 years after the Form 470 in question was posted. See further discussion on pages 4-5.

**Para 39:** Ysleta checked the boxes indicating it did “not have” an RFP. Five days later, it released a detailed RFP for Systems Integrator services. SLD found that Ysleta’s statement that it did not “have” an RFP was misleading, because the fact that it released one less than a week later suggested that it did “have” an RFP at the time it submitted its FCC Form 470. Ysleta contends that it did not “have” the completed RFP until it was ready for release five days later. We recognize that due to the wording of that question, some applicants may have been unsure how to portray the fact that they had not yet released an RFP but intended to do so. On the other hand, the intent of the FCC Form 470 is to provide potential bidders with as much information as possible in order to maximize competition for applicant’s contracts.

Unlike Ysleta, Hesperia Unified truly had **no intention of releasing an RFP at the time the Form 470 was filed** therefore, should not be held to the same scrutiny as Ysleta.

The decision regarding the necessity (or not) of an RFP for the digital transmission services was based on the fact that it was and is the opinion of the District that that telecommunications services, under regulation by the FCC and the California Public Utilities Commission (CPUC) are not subject to the competitive bidding requirements outlined in California Public Contract Code (CPCC). Nowhere in CPCC is the procurement of utilities or telecommunications specifically addressed. However, the District, after further consideration, erring on the side of caution and at the direction of their county counsel, did issue an RFP and advertise in the newspaper subsequent to the posting of the Form 470.

#### **The district did so in order to comply with its interpretation of California Public**

**Contract Code 20112** *“For the purpose of securing bids the governing board of a school district shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some newspaper of general circulation, circulated in the county, and may post on the district’s Web site or through an electronic portal, a notice calling for bids, stating the work to be done or materials or supplies to be furnished and the time when and the place and the Web site where bids will be opened. Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time. The governing board of the district may accept a bid that was submitted either electronically or on paper.”*

At the time the District posted the RFP and advertisement, the Ysleta order was in the process of being implemented. There was little guidance from USAC at the time relating to how the issuance of an RFP subsequent to the posting of a Form 470 would affect the Allowable Contract Date (ACD) associated with the original posting (see further discussion below). The Schools and Libraries News Brief referred to in the “Criteria” section above was published in November 21, 2008, well after Funding Year 2005. The District respectfully asserts that in this instance, there was conflict between local and State procurement guidelines and FCC guidelines. The FCC required the posting a Form 470 to initiate a 28-day competitive bidding process. The California Public Contract Code

required advertising for bids for two weeks. Both requirements were met as illustrated below.

The Form 470 651110000527239 for digital transmission services was posted on 12/28/2004, with an allowable contract date of 01/25/2005. In response to the Form 470, the district was contacted by eight service providers that showed interest in submitting bids<sup>2</sup>. Once the RFP and advertisement was issued on January 29, 2005, all eight of the interested service providers were contacted and provided a copy of the RFP. Despite the advertisement in the newspaper for two consecutive weeks, no additional service providers contacted the District to request a copy of the RFP<sup>3</sup>. The bid closing date was February 14, 2005, 16 days after the start of the advertisement which met the condition of advertising an RFP for two weeks as stated in CPCC 20112 and after the Form 470's ACD of January 25, 2005 and a full 49 days after submission of the Form 470.

Despite the recent clarification(s) that have were put forth by USAC, the District would also respectfully point out that there is/was continued confusion and a lack of specificity regarding implementation and oversight of the Yselta Order as evidenced (in part) by the change in the language associated with the Form 470 from FY2005 and today.

#### **Funding Year 2005 Form 470 Language (See Block 2, Item #8)**

What kinds of service are you seeking: Telecommunications Services, Internet Access, or Internal Connections? Refer to the Eligible Services List at [www.sl.universalservice.org](http://www.sl.universalservice.org) for examples. Check the relevant category or categories (8, 9, and/or 10 below), and answer the questions in each category you select.

**8 ☒ Telecommunications Services**

*Do you have a Request for Proposal (RFP) that specifies the services you are seeking ?*

In subsequent years, Block 2, Item 8 reads as follows:

What kinds of service are you seeking: Telecommunications Services, Internet Access, Internal Connections Other than Basic Maintenance, or Basic Maintenance of Internal Connections? Refer to the Eligible Services List at [www.sl.universalservice.org](http://www.sl.universalservice.org) for examples. Check the relevant category or categories (8, 9, 10 and/or 11 below), and answer the questions in each category you select.

**8 ☒ Telecommunications Services**

*Do you have a Request for Proposal (RFP) that specifies the services you are seeking ? If you check YES, your RFP must be available to all interested bidders for at least 28 days. If you check YES and your RFP is not available to all interested bidders, or if you check NO and you have or intend to have an RFP, you risk denial of your funding requests.*

<sup>2</sup> This was well documented by the District's Purchasing Department and is available for review if the Commission deems it necessary.

<sup>3</sup> This is also well documented and the documentation is available for review if the Commission deems it necessary.

The District is hopeful the Commission will continue to look favorably on issues surrounding alleged competitive bidding violations when presented with compelling argument(s) regarding confusion, attempts at adherence to local, State and Federal guidelines in concert with one another and general discussion about how a denial (or COMAD) would adversely affect the beneficiary's ability to further the educational goals of the students served. We contend that the circumstances presented in this issue specific to Hesperia Unified School District are substantially similar to those addressed in the following:

## DECISIONS BY THE COMMISSION ON APPEALS

**Albert Lea Area Schools, Albert Lea, Minnesota, et al.** DA 09-825 (released 4/14/09)

**Para 3** ...we believe that none of the waivers of sections 54.504(b)(4) and (c) granted here will frustrate the overarching purpose of the 28-day competitive bidding process, which is intended to ensure a fair opportunity for service providers to bid on the services sought by applicants.

**Para 9** ...we find that good cause exists to waive section 54.504(b)(4) of the Commission's rules, which requires applicants to wait 28 days after posting an FCC Form 470 to USAC's website before entering into an agreement with a service provider for the requested services. ... found that a waiver is warranted based on the circumstances presented and based on the facts that there is no evidence of waste, fraud or abuse. The goal of the competitive bidding process is to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available. We find no indication in the record that, as a result of these errors, applicants benefited from their mistakes or that any service provider was harmed. Specifically, there is no evidence in the record that other bids were not considered because these applicants did not fully comply with our competitive bidding rules. We find that the policy underlying these rules, therefore, was not compromised... While we emphasize that our competitive bidding rules are important to ensure a fair bidding process, we find that denying these Petitioners requests for funding would create undue hardship and prevent these potentially otherwise eligible schools and libraries from receiving E-rate funding. We therefore find that good cause exists to grant Petitioners a waiver of section 54.504(b)(4) of our rules...

As stated by the audit team (in Condition and Cause above) and as evidenced by the documentation that was retained and presented:

### **Condition:**

[THE AUDITORS] reviewed the bid responses received and noted that Hesperia Unified School District ("the Beneficiary") properly evaluated the bids in accordance with FCC rules.

### **Cause:**

At the time the FCC Form 470 was completed, the Beneficiary did not intend to utilize a RFP and as such did not indicate so on the FCC Form 470. However, it was subsequently determined that based on the nature of the services being requested, the

**RFP process needed to be utilized.** As such, the Beneficiary sent a RFP to the service providers who responded to the initial posting of the FCC Form 470 and advertised the RFP in a public newspaper. In order to meet the deadline for the filing of the FCC Form 471, *Service Ordered and Certification*, the Beneficiary was only able to keep the RFP posted for 16 days...

Clearly, ALL intent was put forth by Hesperia Unified School District to maintain compliance with federal guidelines, state and local guidelines all while ensuring that they meet their fiduciary responsibility in accordance with local, state and federal guidelines. It is circumstances such as these where the local, State and Federal rules are in conflict where the Commission's intervention is critical to avoid the District suffering the ill-effects of rescission of the desperately needed funding.

As the Commission stated in paragraph 9 of the Albert Lea Order (above)... **We find no indication in the record that, as a result of these errors, applicants benefited from their mistakes or that any service provider was harmed...**

It is our position that, given the documentation available to demonstrate the great lengths that the District went to in order to remain compliant on all levels, the condition stated above is true and a recommendation of full recovery would not be in the best interest of the District and **denying these [this]... requests for funding would create undue hardship and prevent these potentially otherwise eligible schools and libraries from receiving E-rate funding...** DA 09-825, Para 9

In fact, as recently as December 6, 2010, the Commission has looked favorably on extenuating circumstances surrounding alleged competitive bidding violations as part of the Green Bay Area Schools decision.

“...Moreover, it appears from the record that all interested bidders received copies of the RFP. Thus, we find that there was no actual harm to the competitive bidding process and that the underlying policy of ensuring service providers a fair opportunity to bid on the services sought by E-rate applicants was not compromised by Green Bay's error. We therefore conclude that rejecting Green Bay's applications on the ground that Green Bay failed to advise bidders that an RFP existed is not warranted in these instances, especially in the absence of any evidence of waste, fraud, or abuse...”

**Bishop Perry Order** FCC 06-54 Released 5/19/06

**Para 2** ...provide relief from these types of errors in the application process will promote the statutory requirements of section 254(h) of the Communications Act of 1934, as amended (the Act), by helping to ensure that eligible schools and libraries actually obtain access to discounted telecommunications and information services.

**Para 6:** The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account

considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

As noted in the decision published in the Bishop Perry Middle School, New Orleans, LA appeal, SLD # 487170, the “Commission may waive any provision of its rules on its own motion and for good cause shown.” (47 C.F.R. §1.3.) Additionally, a “rule may be waived where the particular facts make strict compliance inconsistent with the public interest.” *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

The District believes that under the circumstances described above, and pursuant to the applicable rulings by the FCC, there is reason for the Commission to waive the associated CFR in this instance. Additionally, the District believes that denial of this request does not “further the purposes of the statutory goal mandated by Congress of preserving and advancing universal service among schools and libraries.”

## **VI. CONCLUSION**

For the reasons discussed herein, the District respectfully requests the Commission grant the Request for Review and Waiver and Remand the case to USAC for further consideration.

All further contact should be directed to Kimberly Friends at [kfriends@csmcentral.com](mailto:kfriends@csmcentral.com).

Attach: